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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RONALD DUNN,

Plaintiff and Appellant,

v.

DEPENDABLE HIGHWAY EXPRESS,
INC.,

Defendant and Respondent.

B256670

(Los Angeles County
Super. Ct. No. BC497132)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Law Offices of Arthur Kim, Arthur Kim, for Plaintiff and Appellant.

Gordon & Rees, Mark Saul Posard and Don Willenburg, for Defendant and Respondent.

INTRODUCTION

Plaintiff Ronald Dunn appeals from the entry of judgment following the trial court's grant of summary judgment in favor of his former employer, defendant Dependable Highway Express, Inc. (Dependable). The trial court concluded Dunn failed to establish any disputed issue of material fact sufficient to defeat summary judgment on his claim for wrongful termination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, §12940 et seq.), as well as a dozen related claims alleging wrongful treatment based on his disability, race and sex. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Dunn's Employment and Allegations

Dunn was hired by Dependable, a trucking company, in April 2009. Dunn worked for Dependable as a truck driver; he claims approximately 80 percent of his assignments were long haul trips, requiring him to be on the road for several days at a time. Dunn was supervised during the relevant time period by his dispatcher, Alfredo Perez. In June 2010, Dunn suffered a spinal injury as a result of an accident while on the job. Following the accident, Dunn sought treatment from a chiropractor for his back and neck pain. Between November 2010 and August 2011, Dunn attended over 30 doctor's appointments for his injuries and provided the paperwork for those appointments to Dependable. Dependable did not prevent Dunn from attending any of these appointments. Indeed, according to Dunn, the Safety Administrator at Dependable told Perez (Dunn's supervisor) that if Dunn "needs to go to the doctor, you need to let him go," to which Perez responded "ok." Although Dunn had physical work restrictions, including no lifting over 15 pounds, no prolonged standing or walking, and no repeated bending, stooping or twisting, he claims he was able to perform his job with those restrictions. Dunn did not request any accommodation from Dependable other than the ability to attend his doctor's appointments.

Dunn contends that he had a doctor's appointment on August 25, 2011, that he notified Perez of the appointment the previous week, and that Perez told him "don't

worry about it.” On the morning of August 24, 2011,¹ Dunn delivered a load in Riverside, California, and then called Perez to check in. Perez instructed Dunn to wait while he checked to see if there was an available load. Perez claims his intent was to see if there was “an available load nearby that [Dunn] could bring back to Dependable headquarters in Los Angeles.” However, Dunn disputes that Perez ever told him of this intent. Dunn claims that Perez told him to wait but “did not specify the location of the load,” and also notes that Perez admitted that, at the time he asked Dunn to wait, there was no specific load yet available. Dunn contends he then reminded Perez of his upcoming doctor’s appointment and Perez responded, “Ron you just want to watch the game, you don’t want to work.” Dunn claims he asked if Perez already had a load and Perez responded, “I need you to wait until a load comes up.” Dunn believed he was going to be assigned to a long haul load that would have “likely caused me to miss my scheduled appointment and needed therapy the next day.” Dunn therefore refused to wait in Riverside and “dispatched himself” back to Dependable headquarters in Los Angeles. No further loads were assigned to Dunn that day. He attended his doctor’s appointment the next day. Perez terminated Dunn for his “insubordination” as of August 24, 2011.

Dunn filed his complaint on December 10, 2012, alleging thirteen causes of action against Dependable, including, as relevant to this appeal, disability discrimination, failure to accommodate his disability, failure to prevent discrimination, all in violation of FEHA,

¹ There are some inconsistencies in the record regarding the date of Dunn’s doctor’s appointment and whether his delivery to Riverside occurred on the same or the preceding day. Dunn’s complaint alleges that the doctor’s appointment was set for August 24, 2011, but at his deposition, Dunn testified that both his Riverside delivery and his doctor’s appointment occurred on August 25. However, the documentation provided by both parties in connection with the motion for summary judgment establishes that Dunn dropped off his load in Riverside on August 24, 2011, and then attended his doctor’s appointment the following day, August 25, 2011. Dunn’s declaration provided in opposition to summary judgment confirms these dates. Regardless, it appears to be undisputed that a long haul assignment on August 24 could have caused Dunn to miss his doctor’s appointment, while a short haul assignment from Riverside to Los Angeles would not have presented a conflict.

and wrongful termination in violation of public policy.² The gravamen of these claims is that, although originally Dependable granted Dunn's request to attend his August 25 doctor's appointment, Perez's statements telling Dunn to wait and suggesting that Dunn did not actually have a doctor's appointment but just did not "want to work" undercut the prior approval and caused Dunn to believe that he was not going to be allowed to attend his doctor's appointment the following day. Thus, Dunn alleges these actions constitute a failure by Dependable to engage in a good faith interactive process in response to his request for a reasonable accommodation and a failure to reasonably accommodate his disability, resulting in disability discrimination and wrongful termination.

B. Dependable's Motion for Summary Judgment

Dependable moved for summary judgment or, in the alternative, summary adjudication, on December 19, 2013. With respect to Dunn's accommodation claim, Dependable argued the undisputed evidence showed it accommodated fully all of Dunn's work restrictions and requests to attend doctor's appointments.

In opposition to Dependable's motion, Dunn argued Dependable's insistence that he wait for an "unspecified" load in Riverside on August 24, 2011, "would have likely caused him to miss his appointment and needed therapy." Dunn further claimed that when Perez "accused Dunn of wanting to take time off for recreational reasons," it demonstrated that Dependable was "fed up with [Dunn's] accommodation needs" and intended to assign him a long haul that day, effectively rescinding the prior approval for his requested time off. As such, Dunn concluded Dependable failed to engage in the requisite good faith interactive process and failed to grant him the reasonable accommodation he had requested.

C. Trial Court's Ruling on Summary Judgment

On March 25, 2014, the trial court granted summary judgment in favor of Dependable, signing Dependable's proposed order with no changes. The court found that, "[o]ther than [Dunn's] conclusory declaration that he could have missed his

² Dunn has not challenged the grant of summary judgment as to any of his other claims in this appeal.

appointment had he waited for another load, there is no evidence that Dependable's request that Plaintiff wait for another load had anything to do with his disability or that Plaintiff would have missed the next-day appointment if he had waited." Thus, Dunn failed to raise a triable issue of fact as to any of his challenged claims.

The trial court entered judgment for Dependable on March 25, 2014. Dunn timely appealed the judgment only as to the second, third, sixth, and ninth causes of action, all of which allege disability claims.

DISCUSSION

A. Standard of review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*)). "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action. . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists" (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850.)

We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*)).

B. Third Cause of Action for Failure to Provide Reasonable Accommodation and Failure to Engage in a Good Faith Interaction Process

1. Failure to Provide Reasonable Accommodation

The FEHA makes it an unlawful employment practice for an employer “to fail to make reasonable accommodation for the known physical or mental disability” of an employee. (Gov. Code, §12940, subd. (m).) A plaintiff’s prima facie case for a failure to accommodate claim must include proof that the employer failed to provide a reasonable accommodation. (See, e.g., *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192 (*Wilson*).)

Dependable argues, and the trial court found, that Dunn presented no evidence that Dependable ever failed to accommodate him. We agree. The only request for accommodation at issue is Dunn’s request to attend his August 25, 2011, doctor’s appointment; up until that point, Dunn does not dispute that he was able to attend all of his medical appointments and continued to receive good work assignments. It is also undisputed that Dependable approved Dunn’s initial request to attend his August 25 appointment and that Dunn was never actually assigned to a job that would have caused him to miss that appointment, or ever told such an assignment was forthcoming. Instead, Dunn bases his claim on the assumption that he was “likely” going to be assigned to a long haul job on August 24, which would “likely” have conflicted with his appointment the next day. But none of that happened—Dunn left Riverside before Dependable had the chance to assign him to a load. As a result, Dunn has no evidence that Dependable actually failed to accommodate him. His belief that it “likely” would have done so cannot sustain his burden to produce evidence demonstrating the existence of triable issues of material fact.³ (See, e.g., *Vournas v. Fidelity Nat. Title Ins. Co.* (1999) 73

³ At oral argument, Dunn claimed that a jury could find, based on favorable inferences, that he acted reasonably in believing he would not be accommodated and therefore refusing to wait. But such inferences can only be based on the actual evidence in the record; here, there is no evidence allowing a reasonable inference about what Dependable would have done because Dunn did not wait long enough to find out.

Cal.App.4th 668, 672 [“[a] party cannot avoid summary judgment based on mere speculation and conjecture”] [citation omitted].)

We therefore affirm the judgment as to Dunn’s claim for failure to accommodate.

2. *Failure to Engage in a Good Faith, Interactive Process*

Dunn’s third cause of action also included a one-sentence allegation that Dependable “failed to engage in a timely, good faith, interactive process with Plaintiff to determine effective reasonable accommodations” in violation of FEHA. It is unlawful under the FEHA for an employer to fail to engage in a “good faith, interactive process” with an employee to determine an effective reasonable accommodation if an employee with a known disability requests one. (Gov. Code, §12940, subd. (n).) Although this claim was incorporated as part of Dunn’s third cause of action for denial of reasonable accommodation for disability, a failure to engage in the interactive process claim is a separate, independent claim requiring proof of different facts. (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 463-464 [citing *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 (*Wysinger*)].) The purpose of the interactive process is to determine what accommodation is required. (*Wysinger, supra*, 157 Cal.App.4th at p. 425.)⁴

Dunn complains that the trial court “ignored” his interactive process claim. It is true that the trial court did not separately address that claim in its order granting summary judgment, although Dependable argues that once Dunn was accommodated, the interactive process claim failed as well.⁵ Regardless of the scope of the trial court’s

⁴ The *Wysinger* court noted that the Americans with Disabilities Act (ADA) does not impose liability on employers who refuse to engage in the interactive process, absent proof that the disability could have been reasonably accommodated. The parties’ proffered federal ADA cases are therefore inapposite, as FEHA provides broader protection for employees than the ADA. (*Wysinger, supra*, 157 Cal.App.4th at p. 425.)

⁵ Of course, a finding for an employer on an accommodation claim does not necessarily foreclose a finding that the employer failed to engage in a good faith, interactive process. (See, e.g., *Wysinger, supra*, 157 Cal.App.4th at p. 425 [holding that verdicts for plaintiff on interactive process and for defendant on reasonable

ruling, we review the issue de novo on appeal. (See *Intel Corp. v. Hamidi*, *supra*, 30 Cal.4th at p. 1348; *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146.) As both parties have already briefed this issue on appeal, we may consider it without further briefing.

Dunn contends that a jury could find that Dependable violated its duty to engage in a good faith, interactive process by (1) “accusing an employee who has a legitimate physical disability and documented need for medical care of fraud, in essence,” and (2) “insisting that a long-haul trucker wait for another unspecified load, after ridiculing his need for medical care.” Essentially, Dunn claims that these actions by Perez were enough to cause a breakdown of the interactive process.

But Dunn cannot show there was any need for the parties to engage in a further interactive process at that point. The purpose of the interactive process is for the employer and employee to work together “to explore the alternatives to accommodate the disability.” (*Wysinger*, *supra*, 157 Cal.App.4th at p. 424; see also *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 242 [*Claudio*] [interactive process used “to determine effective reasonable accommodations”].) Here, Dunn acknowledges that Dependable previously granted his requested accommodation to attend his doctor’s appointment and cannot show that it ever rescinded that approval or did anything to impede his ability to see his doctor. As discussed above, Dunn’s suspicion that Dependable likely was going to assign him to a long haul load that would conflict with his appointment is, without more, merely speculation.⁶ Moreover, Dunn

accommodation claims were not inconsistent, as jury could find defendant refused to engage in the interactive process; therefore, the parties “never reached the stage of deciding which accommodation was required”].)

⁶ Even though Dunn now claims he was “clearly of the belief that his medical appointment was being disregarded,” his own testimony does not make such an unequivocal statement; rather, he said that waiting for an “unspecified load” would have “likely” caused him to miss his appointment the next day. And referring to himself as a “long haul trucker” does not change the undisputed evidence that he actually carried short haul loads about 20 percent of the time.

does not contend that he requested any new or alternative accommodation that might have triggered Dependable's duty to re-engage in the interactive process to determine a new accommodation. The parties had already agreed on the accommodation and had acted in accordance with that agreement up to that point. Dunn was not seeking to engage in a renewed interactive process; instead, he was simply asking Dependable to continue to honor the previously agreed-upon accommodation. As such, Perez's comments, while not helpful, did not invalidate an interactive process that had already concluded.

Dunn cites no authority to support the idea that Dependable had a duty to continue an interactive process that had already accomplished its purpose by providing an accommodation agreeable to both parties. Indeed, the case Dunn cites in his reply, *Claudio*, demonstrates this point. In *Claudio*, the court found a triable issue as to whether the interactive process broke down when the employer refused to communicate through the employee's attorney at the employee's request. (*Claudio*, *supra*, 134 Cal.App.4th at pp. 245-248.) Because the process was never completed, the employer could not establish that no accommodation would have been found. (*Id.* at p. 245.) Here, the true crux of Dunn's claim is not a breakdown in the interactive process, it is that he believed Dependable was about to refuse to honor the agreed-upon accommodation. As discussed above, he did not wait long enough for actual evidence of a failure to accommodate him, and he cannot save his claim by repackaging it as one alleging a failure to engage in the interactive process.

C. Dunn's Second, Sixth, and Ninth Causes of Action Also Fail

Dunn's second cause of action for disability discrimination is premised on the same incident on August 24, 2011, and Dunn's subsequent termination. A *prima facie* case of disability discrimination generally requires evidence showing: (1) plaintiff was a member of a protected class; (2) he was performing competently in the position held; (3) he suffered an adverse employment action; and (4) "some other circumstance suggests discriminatory motive." (*Guz*, *supra*, 24 Cal.4th at p. 355 [citations omitted].)

As with his accommodation claim, Dunn fails to provide any evidence to suggest a discriminatory motive for his termination. He admits that Dependable's "own documents indicate that Dunn was terminated for refusing to wait for a load on 8/24/11," and it is undisputed that Dunn did, in fact, refuse to wait for a load that morning. Because Dunn was never assigned a load that would have conflicted with his doctor's appointment, he was never put in the position of having to refuse that assignment to keep his appointments. Dunn therefore cannot show that he was terminated for refusing to miss his appointment. Summary judgment was therefore warranted as to Dunn's claim for disability discrimination.

Dunn also admits that his sixth cause of action for failure to prevent discrimination and ninth cause of action for wrongful termination in violation of public policy depend upon a finding of discrimination. Thus, they fail as well.

DISPOSITION

The judgment is affirmed. Dependable is awarded its costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.